> ". . . remanded to the trial court *with directions to enter judgment* in harmony with this opinion." (Emphasis supplied.) (PA32a)

This being the decision of that court, if Petitioner believed such a direction effected an unconstitutional deprivation of his property interests, he should have petitioned this Court from the first judgment of the Supreme Court of New Jersey, not from the present judgment. When the matter was remanded to the trial court to enter such judgment, the point that the trial court should take further evidence could have been raised, and petitioner's brief before this court so indicates, in fact, the federal question was not raised before the trial court, but was raised in the first instance in its brief on appeal from the trial court's determination (PB5). What petitioner had attempted to do through the appeal of *Hudson* and *Altomare* to the New Jersey Supreme Court was to limit the effect of the Supreme Court's first opinion, not to the ten parcels of property referred to in the Supreme Court's opinion, but to only one parcel. On the appeal from the trial court, the attorney for the homeowners made the point that if this petitioner wanted the first opinion of the Supreme Court restricted to only one property, he should have immediately applied for a rehearing before the Supreme Court, rather than take the circuitous route of waiting for remand to the trial court and then appealing from that judgment. Now the petitioner is engaged in the same basic tactic.

POINT III

There are no constitutional rights involved warranting the granting of a petition for a writ of *certiorari*.

The "constitutional question" asserted by the petitioner consists of an assertion that the original record before the trial court on remand is constitutionally deficient to sup-

port the factual conclusions implicit in the Supreme Court's original opinion. Most of that original record consisted of the colloquy of counsel, including many admissions and statements from which factual conclusions could be drawn. It is respectfully submitted that all petitioner's argument amounts to is that the record is insufficient to support such conclusions, a contention not significantly different from the contention ordinarily made that the jury's verdict is not supported by the evidence.

While it is conceivable that such a claim could rise to the level of a constitutional question, it is respectfully submitted that such is not the case here. The factual inferences and conclusions on which the householders based their argument before the New Jersey Supreme Court that a constructive trust should be imposed in their favor upon the property interest acquired by Hudson and Altomare are the same factual conclusions as to which this petitioner claimed there was insufficient factual support. The argument could have been made before the initial Supreme Court hearing that there was insufficiency of evidence to support the conclusion, and then that court would then have been faced with this issue. Respondent respectfully asserts that instead of a constitutional question, what is really being raised by petitioner before this court is a question of the sufficiency of the evidence to support factual conclusions. Furthermore, this question is being raised in a proceeding several times removed from the proceeding in which it should have been raised, and by a party who did not even appeal from the judgment of the trial court, which judgment is being sought to be reviewed.

These householders are still insecure in their possession as a result of this petition, and it is hoped that this Court, subject to the requirements of its own calendar, will end this insecurity quickly.

CONCLUSION

It is respectfully urged that for the reasons set forth, this Court should deny Petitioner's petition for a writ of *certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 513

HERBERT HARVEY,

Petitioner,

vs.

JOHN LAWRENCE LYONS, *et als.,*

Respondents.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

This reply brief is to dispose of one question of substance, and several adjective considerations, raised by respondents in a Brief filed herein.

The Facts

Point III of respondents' reply brief says:

> The "constitutional question" asserted by the petitioner consists of an assertion that the original record before the trial court on remand is constitutionally deficient to support the factual conclusions implicit in the Supreme Court's original opinion. Most of that original record consisted of the colloquy of counsel, including many admissions and statements from which factual conclusions could be drawn. . . All petitioner's argument amounts to is that the record is insufficient to support such conclusions.

While this was not the constitutional question raised, petitioner will pay attention here to the argument of respondents that their statement of it is equivalent.

The original record referred to is the record of the hearing before the trial court in *Bron* vs. *Weintraub,* on June 11, 1962, three years before the Opinion which we seek to review. The issues before the court at that hearing are contained in the pre-trial order in that matter, and appear in the Certified Record annexed to the Petition herein (Su-

perior Court of New Jersey, Appellate Division—Appendix to Appellant's Brief, page 35a, line 12) as follows:

> legal title to the premises
> estoppel
> laches
> adverse possession
> res adjudicata
> right to mesne profits

Of these six issues, three (legal title, res adjudicata, right to mesne profits) were raised by Hudson, under whom petitioner claims; the other three (estoppel, laches, adverse possession) were raised by respondents. Essentially what the trial court was trying (and determined in favor of Hudson) were the questions of title and possession. The question of a trust ex maleficio was not before it.

Respondents correctly say in their Brief that the record of that hearing (1962) consisted almost entirely of colloquy of counsel. There was no evidence taken.* They here argue inferences from that colloquy as the source of the facts upon which a trust ex maleficio, though not pleaded, was later constructed (1964).

In *Humphrey* vs. *Eastlack*, 63 N. J. Eq. 136 (Chancery of New Jersey 1902) a plaintiff brought an action on certain grounds, which proved insufficient. He then reargued the matter on fresh grounds which he pieced together out of testimony introduced at the trial of the original issues. The court held that this was inadmissible; one cannot construct a new case out of materials culled from an old one, unless new pleadings give the adversary an opportunity to con-

---

* Except a single document read into the record by counsel, which is not pertinent to the issue. This lack of pertinence is not my opinion, but that of the Supreme Court of New Jersey (Opinion, Appendix to Petition herein, page 26a):

> The cause, however, was not tried on the theory of fraud, and since we are told there were further communications with the Weintraub heirs not spread on the record, we should not decide the case on that basis.

front the new issue.* This axiom is in point here. Even if evidence had been introduced at the 1962 trial tending to support a trust ex maleficio in favor of respondents, such evidence could only be used on pleading such a trust, and granting the legal owner accused of malefaction a hearing on the competence and bearing of the evidence upon the construction of the trust. In our matter, however, there is not even evidence. Petitioner and respondents agree that at the 1962 trial only a colloquy of counsel was recorded. In the absence of new pleading, whatever admissions might

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* The syllabus reads (63 N. J. Eq. 136, 137):

> 2. A complainant who by his pleadings and issues joined thereon and proofs submitted in support of those issues, has presented certain and definite grounds for relief, cannot, after the case is closed, without suggestion of amendment, present by argument only, entirely different and new grounds for relief and have decree made to those grounds.

and the language of the court is (page 146):

> In presenting this cause on the argument the complainant's junior counsel has submitted an elaborate and ingenious brief in which he puts forward what is substantially a new and different case from that alleged in the bill. . .
>
> This, it must be observed, is a clear departure from the complaint to which the defendant was invited to respond, and seeks to argue the cause upon lines outside of the *allegata* and *probata*. This course of procedure has always been received with disfavor. Even clear proof of matters not alleged as ground for relief in the pleadings will not be noticed by the court. . . Where a party has presented his case by his bill and failed to sustain it by evidence, he cannot change his position and base his claim for relief on matters incidentally disclosed by the proofs. . . In *Midmer* vs. *Midmer*, the court of appeals unanimously refused, on an allegation of a trust arising between the parties by express agreement, and mentioning no other trust, to allow proof to be made of a resulting trust in another person.

In *Midmer* vs. *Midmer* cited above, 27 N. J. Eq. 548 (New Jersey Court of Errors and Appeals, 1876), the syllabus reads:

> 1. The bill in this case sought to establish a trust by virtue of an express agreement. The evidence was of a purely resulting trust in an entirely different person. . . *Held*, that the variance between the allegata and probata was fatal to relief.

The language of the court (page 549) is:

> The bill proceeds upon the ground of a trust arising . . . by virtue of an express agreement between the parties. . . There is not the slightest intimation in the bill of another trust in land. The very groundwork of the appellants' case upon the evidence, is a purely resulting trust in the mother of the parties to the alleged agreement, originating almost two years earlier than that stated in the bill. It is manifest that upon such a case, assuming it to be established, the appellants can have no relief upon the pleadings as they stand.

Under the present rules of practice in New Jersey, it is of course the court's pre-trial order which more particularly defines the issues being tried.